

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK Y. FU and DEPARTMENT OF THE AIR FORCE,
AUDIT AGENCY, MARCH AIR RESERVE BASE, CA

*Docket No. 01-707; Submitted on the Record;
Issued November 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue for determination is whether the claimant sustained an emotional condition while in the performance of duty.

On June 2, 1999 appellant, then 46-year-old auditor, filed an occupational disease claim alleging that he suffered constant harassment and retaliation by his employing establishment following his involvement in Equal Employment Opportunity (EEO) activities in 1994. He provided a detailed chronological description of the particular employment factors that caused his condition.

In a decision dated January 18, 2000, the Office of Workers' Compensation Programs denied compensation on the grounds that appellant failed to allege a compensable factor of employment to support that he sustained an emotional condition while in the performance of duty.

The Board has duly reviewed the case and finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.¹

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his employment. This burden includes the submission of a detailed description of the employment conditions or factors which appellant believes caused or adversely affected the condition for which he claims compensation.² This burden also includes submission of rationalized medical opinion evidence, based upon a complete and accurate factual and medical background of appellant, showing a causal relationship between the condition for

¹ The Board herein adopts the 18 points listed by the Office in its decision as the alleged factors of employment.

² See generally 20 C.F.R. §§ 10.115-116 (1999).

which compensation is claimed and the implicated factors or conditions of his federal employment.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to appellant's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.⁴

In this case, appellant related that in 1991 he started questioning whether his performance ratings accurately reflected his production activity. He felt that instead of receiving an "excellent" rating he should have been given a "superior" rating. Appellant devised a productivity/efficiency analysis comparing him with the other senior auditors and felt he came out ahead.

Although appellant contends that he was the victim of racial discrimination during the performance rating process, his reaction to his performance appraisal is not compensable, in the absence of evidence showing error or abuse on behalf on the employing establishment in carrying out that administrative function. Appellant has not shown that he received an "excellent" rating in error or that the employing establishment acted abusively in issuing appellant's performance rating. For harassment or discrimination to give rise to a compensable disability under Act, there must be some evidence that the harassment or discrimination did in fact occur.⁵

On August 11, 1994 appellant contends that he was singled out and told he could not ask questions during a question-and-answer session regarding the difference between expenses and capital expenditure transactions. Advising an employee regarding priorities of importance in an assignment, absent evidence of abuse or error, is considered to be an administrative action and not in the performance of the claimant's regular or specially assigned duties. Appellant's perception that his supervisor was attempting to undermine his intelligence was self-generated. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. A claimant must substantiate such allegations with probative and reliable evidence.⁶

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Anna C. Leanza*, 48 ECAB 115 (1996).

⁶ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

On August 30, 1994 appellant alleged that his supervisor, Ms. Edsall, raised her voice and pointed at him, accused him of going off on a tangent. She apparently also told him that she was losing patience with him. According to appellant, the incident caused distrustful feelings and he became hampered in his ability to exercise due care and to function as an auditor. However, a supervisor monitoring a claimant's assigned duties and requesting that a project be finished by a specific date or time is an administrative function. There is no evidence or record that Ms. Edsall acted abusively or in error during her conversation with appellant on August 30, 1994.

The record reveals that, on September 6, 1994, appellant filed an EEO complaint. Although he contends that he became the victim of continuing discrimination and retaliation as a result of his EEO activities, there is no factual support for his allegations. Filing grievances and EEO complaints, by themselves, does not establish that harassment has occurred in the workplace.⁷

Appellant also generally alleges that he was discriminated against when he was not chosen to participate in special projects,⁸ when he was denied certain promotions such as a GM-14 office chief position⁹ and when he was not given the opportunity to continue his CPA training.¹⁰ The Board, however, has consistently held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under Act, as they do not involve appellant's ability to perform his or her regular or specially assigned duties, but rather constitute his desire to work in a different position.¹¹ Determinations by the employing establishment concerning promotions and the work environment are administrative in nature and not a duty of the employee.¹²

The claimant alleges that, on December 4, 1990, Lieutenant Colonel Links removed him from the Zweibruecken Base closure audit, saying that appellant had done too many big projects. He further alleges that on December 12, 1990 he was instructed by Lieutenant Colonel Links to assist a GS-7 auditor trainee do a surprise cash count and follow her instructions even though appellant felt that he was the more experienced senior auditor. Appellant's disagreement with a

⁷ See *Alice M. Washington*, 46 ECAB 382 (1994).

⁸ Appellant cites a temporary promotion given to another acting branch chief, Rick Brown, which appellant thought was unfair. He contends that less qualified white females were chosen for promotions over him.

⁹ Appellant also contends that he was unfairly given a "fully successful" rating in 1989 and was, therefore, shut out of several GM-13/14 Branch/Office Chief and GM-14 Program Manager positions that became available and were given to employees who held higher performance ratings than appellant.

¹⁰ Appellant alleges that the employing establishment would only allow him to complete a CPA program as it did not cost the agency any more than \$200.00.

¹¹ *Anna C. Leanza*, *supra* 5.

¹² *George A. Ross*, 43 ECAB 346 (1991).

work assignment decision made by his superiors is not in the performance of his regular or specially assigned duties.¹³

From March to June 1994, appellant states that he was monitored and criticized by his supervisor over every single detail of his audit reports. He feels that they demanded an extraordinary amount of detail in excess of what was required of other employees at his level. Contrary to appellant's position, the assignment of work is an administrative or personnel matter of the employing establishment and not a duty of the employee and, absent evidence to support a finding of error or abuse by his supervisor, there no compensable employment factor alleged.¹⁴

Subsequent to filing an EEO complaint, appellant relates that he was rotated to several positions. He alleges that during November 1995 he was verbally abused and mistreated by a female supervisor. Appellant, however, has provided no corroborating evidence to establish his allegation as factual. The Board notes that a statement from the supervisor in question states that appellant was "an extremely difficult employee, unwilling to take any direction, guidance, or suggestion."¹⁵

Appellant attributes his emotional condition to the actions of his coworkers as well. He contends that they saw him as a threat and refused to associate with him. However, appellant's perception of his coworkers actions is self-generated and not considered to be in the performance of his regular or specially assigned duties.

Appellant alleges a memorandum dated November 10, 1998 was generated to make him look incompetent. The memorandum discusses the length of time it took him to complete a draft report and the various problems with the draft. Since there is no evidence of record to suggest that the employing establishment acted abusively in issuing the November 10, 1998 memorandum, its actions in that regard are administrative and appellant's reaction to the memorandum is not considered to be in the performance of duty.

Consequently, the Board concludes that appellant has failed to prove a compensable factor of employment. The Board, therefore, finds that the Office properly denied appellant's claim for compensation on the grounds that he failed to establish that he sustained an emotional condition in the performance of duty.¹⁶

¹³ *Id.*

¹⁴ See *Janet D. Yates*, 49 ECAB 240 (1997).

¹⁵ Appellant was also denied several requests for transfers from supervisors he deemed to be abusive.

¹⁶ Because appellant has failed to allege a compensable factor of employment, the medical evidence was not considered.

The January 18, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member